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FEDERAL COMMUNICATIONS COMMISSION  
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
 )  
Implementation of the )  
Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )  
 )  
Cable Home Wiring )

MM Docket No. 92-260

To the Commission:

**THE AMERICAN PUBLIC POWER ASSOCIATION'S  
COMMENTS IN SUPPORT OF  
OPEN ACCESS TO CABLE HOME WIRING**

Pursuant to Sections 1.414 and 1.419 of the Commission's Rules and the Commission's November 6, 1992 Notice of Proposed Rule Making ("NPRM"), the American Public Power Association ("APPA") respectfully submits its comments to encourage the Commission to adopt rules on cable home wiring which foster competition in furtherance of the objectives of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").

APPA respectfully suggests that the rules adopted by the Commission must provide for open, unfettered access to cable

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home wiring by competing cable television operators and other entities. A rule providing for consumer ownership may facilitate such access, but is not essential. Rather, APPA submits that a rule similar to that adopted by the Commission regarding telephone inside wiring, which ensured consumer control regardless of ownership, would encourage competition in cable service while avoiding many of the complexities which might arise from a consumer-ownership rule.

#### **I. APPA REPRESENTATIVES**

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## II. NATURE OF APPA'S INTERESTS IN THIS MATTER

APPA is the national service organization representing the interests of more than 1750 locally-owned electric utility systems. Most of these public power systems are municipally-owned, but several are organized as public power districts and some are state-owned. APPA also serves the needs of its members that own and operate cable television systems or that are contemplating the creation of locally-owned and -operated cable television systems.

Many of APPA's members use fiber optic or co-axial cable for utility functions including electric load management, supervisory control and data acquisition ("SCADA") systems, and automated meter reading. Some APPA members also use such wiring for intra-governmental communications and educational communications. It is a natural extension for municipalities to utilize these cable networks in combination with cable home wiring to provide local cable television service. Additionally, APPA's member cities are typically "franchising authorities" as that term is used in the Act.

Approximately two-thirds of the more than sixty (60) existing municipally-owned and -operated cable television systems

in the country are located in communities that also own and operate their own electric utility systems. A recent survey by APPA indicates that many other APPA members would consider establishing competing cable television systems if the barriers to competition were eliminated. Of course, a fundamental objective of the Act is the elimination of such competitive barriers. Rules providing for open unfettered access to, or consumer ownership of, home cable wiring would eliminate one such barrier.

### **III. APPA'S COMMENTS**

#### **A. The Commission's Rules Should Promote Competition**

It is essential that the Commission adopt rules that promote competition in the cable television industry. Fostering competition is one of the principal objectives of the Act. Rules that facilitate municipal competition would be consistent with the Act's goals and would benefit cable television consumers.

Municipal competition is particularly valuable, not only within the service area of a particular municipality, but also throughout the country, as a benchmark against which other op-

erators may be measured. The effectiveness of benchmark, or "yardstick," competition has been proven for decades in the electric power industry and should be equally applicable to the cable television industry.

Private cable operators essentially serve two masters -- their customers and their shareholders -- whose interests often differ. Customers are interested in service; shareholders are primarily interested in a return on their investment.

Municipal operators, however, have but one master to serve -- the customers. Municipalities are not profit-making entities and have no shareholders. They need only to provide the best service possible at rates sufficient to cover the costs of providing service, with no over-riding profit objective.

Competition by municipal operators, and even the threat of such competition, will ordinarily be a more effective regulator of private operators than will regulation. Where a municipal operator provides service, direct competition will exist, providing downward pressure on rates and charges and upward pressure on quality and scope of service. In locales that do not

enjoy the benefits of direct competition, the threat of competition will provide similar pressures, even if to a somewhat lesser degree.

The Commission's cable home wiring rules will affect the availability of competition. Existing cable operators must not be able to use control over existing wiring as a tool for frustrating competition from municipal or private operators. Threatened removal of existing wiring, undue charges to be paid by a consumer to acquire ownership or control of existing wiring and the inconveniences associated with duplicative or sequential installations would all have a chilling effect on competition. The Commission's rules must not permit cable operators to use home wiring as a shield against competition.

**B. Home Wiring Can Be Useful For Functions Beyond Cable Television**

The Commission should bear in mind that home wiring can be useful for functions beyond cable television service. As noted, some of APPA's members use fiber optic and co-axial cable systems for utility-related functions (i.e., load management and remote meter reading), and such use is expected to increase over time. Consumers should be able to utilize a

single wiring scheme for as many additional services as are available to the consumer. As additional services and uses become available, they should be susceptible to ready integration with wiring currently used for cable television. If each individual use is to require a separate wiring system, the wires will eventually be so many as to serve the unintended function of holding the home together in a hurricane! As functional as that might be under those circumstances, the Commission must not allow each operator to control home wiring.

**C. The Act And Its Legislative History Contemplate The Promotion Of Competition**

With its passage of the Act over the President's veto, Congress forcefully demonstrated its support for competition in the cable television industry. Congress noted in its findings that the absence of local competition had resulted in "undue market power for the cable operator as compared to that of consumers and video programmers" and that "the cable industry has become highly concentrated." §§ 2(a)(2) and (4). In response, Congress enacted a broad range of measures intended in large part to "promote the availability to the public of a diversity of views and information through cable television and other

distribution media;" to "rely on the marketplace, to the maximum extent feasible, to achieve that availability;" and to "ensure that cable television operators do not have undue market power vis-a-vis consumers and programmers." §§ 2(b)(1),(2) and (5). As succinctly summarized in the Senate Report on S.12, "[t]he purpose of this legislation is to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service." Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 102-92, 102 Cong., 1st Sess. at 1 (1991) ("Senate Report").

Among the specific measures that Congress enacted to encourage competition was a provision on cable home wiring. During the hearings preceding the passage of the Act, Congress had learned that cable operators have sought to stifle competition by denying competitors access to wiring in the homes of potential customers. Congress responded to this problem in Section 16(d) of the Act, by requiring the Commission, within 120 days of the date of enactment, to "provide rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator



within the premises of such subscriber." While the Act itself does not go into further detail, its legislative history, as the Commission itself noted in its Notice of Proposed Rulemaking on Home Wiring, "appears to favor the Commission fashioning rules that would enable the subscriber to acquire cable home wiring upon termination of service." NPRM at 1.

In its report on H.R. 4850, the House Committee on Energy and Commerce recognized the connection between cable home wiring and competition and opted for subscriber ownership (with some restrictions discussed below):

The Committee believes that subscribers who terminate cable service should have the right to acquire wiring that has been installed in their dwelling unit. This right would enable the consumers to utilize wiring with an alternative multichannel video delivery system and avoid any disruption the removal of such wiring may cause.

House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 118 (1992) ("House Report").

Similarly, the Senate Committee on Commerce, Science and Transportation stated that

This [home wiring] provision addresses the issue of what happens when a subscriber terminates cable service. Some cable operators take the position that the wiring inside the home belongs

to the operator. Thus, when the subscriber terminates service, these cable operators remove the wiring, often causing damage in the process. These operators do not give the home owner an opportunity to acquire the wiring. In addition, if a subscriber decides to terminate cable service and later reinstate it or seek service from a different cable company, the subscriber should not have to bear the cost and inconvenience of having new wiring installed.

The FCC permits consumers to remove, replace, rearrange, or maintain telephone wiring inside the home even though it might be owned by the telephone company. The Committee thinks that is a good policy and should be applied to cable. For cable, however, the FCC should extend its policy to permit ownership of the cable wiring by the homeowner. In doing this, the Committee urges the FCC to adopt policies that will protect consumers against imposition of unnecessary charges, for example, for home wiring maintenance. . . .

Senate Report at 23. The Senate Committee also stated, in its "Summary of Major Provisions" of the Act, that "[t]he FCC shall establish rules and procedures to permit home owners to retain their wiring when they terminate their cable service." Senate Report at 65.

**D. Open Access To Cable Home Wiring Is Essential To Competition**

If Congress's policy of encouraging competition in the cable industry is to be realized, it is essential that barriers to competition be eliminated. One such barrier is the ability

of cable operators to deny their competitors access to cable home wiring. The experience of the City of Glasgow, Kentucky, illustrates this well. 1/

When the City of Glasgow sought to build a cable television system in competition with that of the existing cable operator, the operator used the cable home wiring issue, among other devices, in an attempt to block or competitively disadvantage the City's entry into the market. Specifically, when the City sought to use or disconnect the existing home wiring, the operator promptly secured a temporary restraining order and forced the City into protracted litigation over use of existing inside wiring. TeleScripps Cable Co. v. Electric Plant Board of the City of Glasgow, CA No. 89-CI-269, (Kentucky Barren Circuit Court, 43rd Judicial Circuit, 1989). While the City ultimately won -- proving to a jury that the wiring was a fixture of the residence and owned by the subscribers rather than the cable operator -- it was at a substantial competitive dis-

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1/ APPA's testimony bringing Glasgow's concerns to the attention of the House Subcommittee on Telecommunications and Commerce may well have been instrumental in the enactment of the home wiring provision of the Act. A copy of the testimony is attached as Exhibit A.

advantage for more than two years and incurred hundreds of thousands of dollars in legal fees. 2/

As the court found in the Glasgow case, "[s]ubscribers usually object to the duplication of the underground outside portion of the [house] drop,<sup>3/</sup> due to damage to yards, driveways, sidewalks, etc. Also, some object to the duplication of the inside wiring being inconvenient and unsightly." Opinion and Order Granting Temporary Restraining Order, Exhibit B at 3. In fact, in its testimony before Congress, the City estimated that approximately twenty-five percent of its potential customers were unwilling to switch cable operators if that meant having their houses rewired. Exhibit A at 6. At that rate, access to home wiring can in many cases spell the difference between a successful and unsuccessful competitive enterprise.

Other findings in the Glasgow litigation are also instructive here. For example, after reviewing the claims of the

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2/ Both the Opinion and Order Granting Temporary Restraining Order, dated October 2, 1989, and the final Judgment in the City's favor, dated August 28, 1991, are attached as Exhibit B.

3/ A "house drop" is that portion of the cable system that extends from the utility pole or its underground equivalent to its termination point of connection with a TV set. It consists of exterior wiring and wiring inside the home.

operator in Glasgow and several other cases, the court found that "[t]he material used to install the service line, if removed would be of little or no value to the consumer [sic] and in the past they have rarely been removed;" that "[t]he salvage value of the [house] drop material was and is insufficient to justify removal by [the operator] or the [City] especially when the possibility of future use was considered;" and that neither the operator nor the subscribers had anticipated or intended removal of the wire. 4/ Exhibit B at 6. Taken together, these findings suggest that home wiring has little economic value to a cable operator after a subscriber has given notice of termination and that any effort by the operator to control the use or disposition of such wiring is motivated by a desire to thwart competition.

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4/ While reaching inconsistent decisions on ownership of house drops, other courts have made similar findings. See, e.g., TV Transmission v. County Board of Equalization, 338 N.W. 2d 752, 753 (Neb. 1983); Continental Cablevision of Michigan, Inc. v. City of Roseville, 425 N.W. 2d 53, 55.n.7, 56 (Mich. 1988); Bresnan Communications Co. v. City of Negaunee, No. M84-219-CA2 (W.D. Mich. August 17, 1989).

**E. At A Minimum, The Commission Should Adopt Rules That Reflect The Same Policies As Those Applicable To Inside Telephone Wiring**

As indicated above, APPA's primary interest in this proceeding is to secure for its members a full and fair opportunity to compete in the cable television arena. While APPA would not oppose rules mandating subscriber ownership of home wiring or establishing terms for such ownership, APPA believes that the Commission can achieve the goal of promoting competition simply by adopting rules for cable that embrace the Commission's policies applicable to inside telephone wiring.

The legislative history of the home wiring provision of the Act includes Congress's approval of the Commission's policy applicable to inside telephone wiring and suggests that the Commission, at a minimum, adopt a similar policy for cable. Senate Report at 23. Under that policy, telephone companies cannot use claims of ownership as a basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring. Memorandum Opinion and Order on reconsideration of Docket 79-105, 1 FCC Rcd 1190 (1986).

The Commission adopted its inside telephone wire policy in order to encourage competition -- in that case, for the instal-

lation and maintenance of inside telephone wiring. The Commission initially ordered telephone companies to forego all claims of ownership of "expensed" inside wiring by January 1, 1987, and of "capitalized" inside wiring by the end of the period for amortizing their investment in the wiring. The telephone industry greeted this order with a host of objections, including objections that the order amounted to an unconstitutional taking of property and interfered with rights and duties conferred under state laws and regulations. On reconsideration, the Commission withdrew its loss-of-ownership requirement and instead focused directly upon the specific anti-competitive conduct that it wished to eliminate. In so doing, it achieved its central purpose and avoided some of the potential pitfalls to which a loss-of-ownership rule might have led.

The key operative provision of the Commission's inside telephone wiring policy is paragraph 35, which reads in part as follows:

Customers' ability to obtain inside wiring installation and maintenance from sources of their own choosing could be inhibited if a telephone company were to use a claim of ownership as a basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring. Therefore, we will preclude telephone companies from imposing such restrictions with respect to

inside wiring that has ever been installed or maintained under tariff. Ratepayer rights would also be abridged if telephone companies were to receive additional compensation for such wiring after it had been expensed or fully amortized. Therefore, we will preclude the telephone companies from requiring that such wiring be purchased and from imposing a charge for the use of such wiring. . . .

Although the circumstances surrounding home cable wiring are not identical to those surrounding home telephone wiring, APPA submits that the Commission can and should use a similar approach to open up competition in the cable industry.<sup>5/</sup> Specifically, by focusing upon the cable operators' anticompetitive conduct -- i.e., cable operators' use of claims of ownership of cable home wiring to restrict access to such home wiring -- the Commission can promote competition directly by precluding cable operators from imposing restrictions on the use of home wiring without bogging down in complex factual is-

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<sup>5/</sup> One significant difference is that telephone companies are often subject to rate regulation that may restrict their ability to recover home telephone wiring costs. By contrast, cable operators have generally been unregulated and free to recover home cable wiring costs at the time of installation or during the term of usage. This distinction arguably supports greater Commission latitude in adopting a rule of outright subscriber ownership of cable home wiring. To the extent operators failed to recover home cable wiring costs through an installation charge or otherwise, they did so for their own strategic business reasons, not because of regulatory prohibitions.



sues and the vagaries of state law surrounding ownership of home wiring. Such an approach would also lend itself well to uniform nationwide application and would free all concerned -- including operators, competitors, franchising authorities, the Commission and the courts -- of the need for time-consuming and expensive case-by-case determinations of the kind that the City of Glasgow experienced.

**E. Multiple-Unit Dwellings And Multiple-Building Settings Are Essentially The Same As Single Family Homes For Cable Wiring Purposes**

**1. Multiple-Unit Dwellings**

The Commission has requested comment on whether its cable home wiring rules would need to be tailored to different settings such as subscribers in single-family homes, multiple-unit dwellings (i.e., apartment buildings) and multiple-building settings (i.e., college campuses, military bases and hospitals). NPRM at 2. For cable home wiring purposes, these settings require essentially no different treatment.

With respect to multiple-unit dwellings such as apartment buildings, it is APPA's understanding that the individual apartments (in which the individual subscribers reside) are ordinarily wired in a manner essentially identical to a single

family home. The cable within the individual apartment is not served from a common arterial cable running through the building. Rather, the wiring in each apartment has its own cable which runs to a common point in the building at which each individual cable is connected to the cable operator's service drop outside the building.<sup>6/</sup> The common point may be in a utility room, a basement, the roof, or an exterior wall of the apartment building. Wherever the interconnection is located, the key point is that each apartment is ordinarily wired separately, and therefore each apartment has its own cable that can then be connected to the cable operator of the subscribers' choosing.

That the matter is readily resolvable is borne out by the experience of the City of Glasgow, Kentucky and TeleScripps Cable Company. Following entry of the court's judgment of sub-

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<sup>6/</sup> APPA is aware that the House Report, as the NPRM indicates (at 2), states that "[i]n the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers." House Report at 119. As stated in the text, however, APPA does not believe that there are many multiple-unit dwellings that utilize a common wiring scheme.

Insofar as whether the rules need to distinguish between existing and future cable home wiring installations, APPA believes that no distinction is necessary, with one important exception. No cable operator should be permitted to make new installations in a manner that would frustrate the pro-competitive objectives of the Act. This suggested prohibition should be drafted with sufficient breadth to apply regardless of who installs the new wiring (i.e., regardless of whether such wiring is installed by a cable operator, the building owner or manager, or any other party).

Removal of existing wiring should rarely be requested, but upon termination of service a subscriber may conceivably wish not to have visible wall outlets or dangling cables either inside or outside the structure. Wall outlets are easily removed and the hole in the wall may be easily repaired. External wires, if of any rightful concern to a resident of a multiple unit dwelling, may be easily cut, again with the hole in the wall (if any) readily patched or covered. Subscribers should continue to be compensated for damage caused by the operator's removal of existing wiring, as currently required.

## **2. Multiple-Building Settings**

Multiple-building settings should require no distinction from single-family homes. Each multiple-building setting is presumably owned and operated by a single owner which would be a single subscriber. In the case of a hospital, for example, the hospital management will select the cable operator of its choice to service the hospital or designated buildings. It is not as if each hospital room must be wired to allow each patient to select a different cable operator. The same should be true for college campuses and military installations. In short, these settings appear to present no unique issues for the Commission to address.

### **G. Termination Based On Nonpayment Or Theft Of Service**

The Commission requested comment on how the home wiring rules should be tailored to address termination for nonpayment or theft of service. NPRM at 2-3. APPA sees no connection between the two.

An operator's claim against a subscriber for nonpayment or theft of service should have nothing to do with subscriber ownership of, or open access to, cable home wiring. While a de-

faulted or thieving subscriber may terminate service or have its service terminated by one operator, that subscriber may still seek service from a second operator. Each operator would have its own claims against the subscriber.

Perhaps the point is best made by analogy. John Doe may have credit cards with two different oil companies. If John Doe defaults on payment to Oil Company A, Mr. Doe may continue to buy gasoline from Oil Company B. Just as Oil Company A cannot put a lock on the gas cap of John Doe's car to keep him from buying gasoline from another supplier, so cannot one cable operator stop a defaulting subscriber from obtaining service from another cable operator. Each operator must deal with its own collection and enforcement problems and any such claims should be resolvable on a local level without federal involvement. The matter has nothing to do with the home wiring issue.

#### **H. State Property And Tax Law Considerations**

The Commission has requested comment on how state property and taxation law should affect the Commission's rules concerning the disposition of cable home wiring upon termina-

tion of service. NPRM at 3. APPA believes that state property and taxation law should have no effect upon the Commission's home wiring rules.

As noted above, the rules adopted by the Commission regarding the disposition of home wiring upon the subscriber's termination of service do not need to depend upon the subscriber's ownership of the wiring. The Commission need only provide that, upon the subscriber's termination of service, the cable operator that installed the wiring in the home may not rely upon a claim of ownership of the wiring as a basis for restricting the subscriber's use of the inside wiring. If the homeowner's use of the wiring upon termination of service is unfettered under the Commission's rules, then it is irrelevant whether the cable operator owns the wiring for purposes of assessing personal property tax, as in Continental Cablevision of Michigan, Inc. v. City of Roseville, 425 N.W. 2d 53 (Mich. 1988), and Chillicothe Cablevision v. Limbach, 1987 WL 12460 (Ohio App. 1987), or whether the land and building owner owns the wiring, as in Telescripps Cable Co. v. Electric Plant Board of the City of Glasgow, supra.

## **I. Signal Leakage Control**

The NPRM (at 3) requests comments on signal leakage control in the context of the home wiring rulemaking. As the NPRM indicates, the House Report (at 119) already states that cable operators should "continue to have legal responsibility to prevent signal leakage...." APPA agrees, and the Commission need only include a statement to this effect in its rule simply to make clear that the resolution of the home wiring issue is not altering this responsibility. In this respect, inside wiring is no different from inside electrical wiring.

## **IV. CONCLUSIONS**

Proper disposition of the home wiring issue is central to the Act's objective of promoting competition in the cable television industry. APPA urges the Commission to adopt rules consistent with the foregoing comments to ensure that a cable operator is not able to frustrate competition through control of home wiring. This can be accomplished by Commission rules requiring open, unfettered access to home wiring by the operator of the customer's choosing or by consumer ownership of the wiring. Like telephone lines, electric transmission lines, natural gas pipelines, highways and rail, competition cannot

exist if the channels of commerce relevant to the industry are controlled by one segment of that industry.

Respectfully submitted this 1st day of December, 1992.

A handwritten signature in black ink, appearing to read "Allan Hammett", written over a horizontal line.

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Mr. BOUCHER. Mr. William Ray.

STATEMENT OF WILLIAM J. RAY

Mr. RAY. Thank you, Mr. Chairman.

I am going to tell you some things you haven't heard yet. I'm with a municipally owned electric utility in south central Kentucky. I'm here representing Glasgow, KY and the American Public Power Association.

I am going to draw you an analogy about the electric power business and the cable TV business that will be different from what you've heard before.

The present situation of the cable television marketplace is very similar to that of electric power in the 1930's. At that time, huge private power companies sought to monopolize electricity—and at one time they did a good job of it; they had about 85 percent of all the electricity generated in the United States.

In response to the unscrupulous business practices of those power trusts—they were called at that time—many communities created their own publicly owned power systems to beat those private operators. That strategy worked. Prices came down; customer service got better, and the people received the benefit.

The same strategy will work with cable television, but in some ways it will be even more difficult to implement. Years ago when towns sought to establish their own power companies, there was no way that the cable operators could strike a deal with the forces of nature to arrange for electrons not to flow in a publicly owned system. The power companies never even dreamed of claiming the electric wires in the consumers' homes and telling them that if they wanted to create their own power system they needed to rewire their house. Even they were not that ruthless; but the MSO-dominated private cable operators are.

In 1988, the city of Glasgow decided that they would begin construction of a municipally owned cable television service in direct competition with TeleScripps Cable Co. The desired results were again achieved. TeleScripps immediately began slashing rates; upgrading technical performance; adding channels; providing local origination programming, and becoming an exemplary corporate citizen.

Were it not for a couple of unexpected results, my testimony to you today would be that you only need to relax while the municipalities jump into the fray and regulate the cable television industry through real head-to-head competition.

Unfortunately, there are a couple of problems that must be addressed before that can happen. The first barrier to municipal entry into the market is the incumbent industry's programmers that allow them to dictate what programming will be available to new competing operators.

And although, as the testimony you heard earlier, most of the programmers agreed to sell to us because we were a cable system, but a couple—and in particular Turner Broadcasting systems—refused to sell us TNT and the ESPN sells it programming, with the exception of NFL Football.